

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

STEVEN AMES BROWN, et al.,  
Plaintiffs,

v.

ANDREW B. STROUD, et al.,  
Defendants

No. 08-cv-02348 JSW (NC)  
No. 09-cv-03796 JSW (NC)  
No. 11-cv-05822 JSW (NC)

**ORDER RE: FURTHER  
BRIEFING ON THE ISSUE OF  
SUBJECT MATTER  
JURISDICTION**

ANDREW B. STROUD, et al.,  
Plaintiffs,

v.

CASTLE ROCK ENTERTAINMENT, et al.,  
Defendants

LISA SIMONE KELLY,  
Plaintiff,

v.

WALLY ROKER, et al.,  
Defendants

ORDER RE: FURTHER BRIEFING  
ON THE ISSUE OF JURISDICTION

1        These three related cases were referred to the undersigned Magistrate Judge for a  
2 report and recommendation on the pending motions for default judgment. The Court held a  
3 hearing and took the motions under submission. After further review of the pleadings,  
4 however, the Court has concerns about the possible lack of subject matter jurisdiction over  
5 the claims asserted by the Estate of Nina Simone (“the Simone Estate”) in the *Kelly v.*  
6 *Roker* action and its counterclaims in the *Brown v. Stroud* action. In light of the  
7 fundamental, threshold nature of the jurisdictional issue, the Simone Estate is ordered to  
8 submit further briefing addressing these concerns as set forth below.

9        When presented with a motion for default judgment, the Court has “an affirmative  
10 duty to look into its jurisdiction over both the subject matter and the parties.” *In re Tuli*,  
11 172 F.3d 707, 712 (9th Cir. 1999). Furthermore, federal courts are courts of limited  
12 jurisdiction and are presumptively without jurisdiction. *Kokkonen v. Guardian Life Ins.*  
13 *Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court may dismiss an action on its own  
14 motion if it finds that it lacks subject matter jurisdiction over the action. *Fiedler v. Clark*,  
15 714 F.2d 77, 78-79 (9th Cir. 1983); *see also* Fed. R. Civ. P. 12(h)(3) (“If the court  
16 determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the  
17 action.”).

18        Federal courts have original jurisdiction over “all civil actions arising under the  
19 Constitution, laws, or treaties of the United States,” 28 U.S.C. § 1331, and over “all civil  
20 actions where the matter in controversy exceeds the sum or value of \$75,000 . . . and is  
21 between citizens of different states,” 28 U.S.C. § 1332(a). District courts have diversity  
22 jurisdiction over “all civil actions where the matter in controversy exceeds the sum or value  
23 of \$75,000, exclusive of interest and costs” and the action is between: “(1) citizens of  
24 different States; (2) citizens of a State and citizens or subjects of a foreign state . . . ; (3)  
25 citizens of different States and in which citizens or subjects of a foreign state are additional  
26 parties; and (4) a foreign state . . . as plaintiff and citizen of a State or of different States.”  
27 28 U.S.C. § 1332. “Absent unusual circumstances, a party seeking to invoke diversity  
28 jurisdiction should be able to allege affirmatively the actual citizenship of the relevant

parties.” *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). Challenges to diversity jurisdiction are measured against the state of facts that existed at the time the action was filed. *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570-71 (2004).

**A. *Kelly v. Roker***

On December 2, 2011, Lisa Simone Kelly (“Kelly”), as the duly appointed administrator of the Simone Estate, commenced this action against Andrew Stroud, Andy Stroud, Inc. (“ASI”), and Wally Roker, individually and doing business as ICU Ent. Dist. and Wally Roker Music. Dkt. No. 1.<sup>1</sup> According to the complaint, the action arises out of the alleged fraudulent conveyance, disposal, and/or spoliation of the Nina Simone materials subject to the pending *Brown v. Stroud* litigation. *Id.* at 3. The complaint asserts state law claims for conversion, accounting, and fraudulent transfer under Cal. Civ. Code § 3439.04, and a claim for declaratory relief under 28 U.S.C. § 2201. *Id.* at 10-15. The complaint further asserts that the Court has jurisdiction over the subject matter of the action pursuant based on diversity, 28 U.S.C. § 1332. *Id.* at 3. The complaint alleges that Kelly is “an individual who resides in Florida”; Wally Roker is a citizen of California; ICU Ent. Dist. and Wally Roker Music are Roker’s business designees; Andrew Stroud is a citizen of New York; and “ASI is a corporation organized under the laws of the State of New York.” *Id.* at 1-2.

ASI counterclaimed against Kelly, in her capacity as the duly appointed administrator of the Simone Estate, asserting claims for declaratory judgment, copyright infringement, vicarious copyright infringement, contributory copyright infringement, and copyright infringement under California law. Dkt. No. 11 at 11, 16-23. ASI asserts that “jurisdiction is proper because the counterclaims form part of the same case or controversy as the original claim and therefore falls within the supplemental jurisdiction of this Court under section 1367 of Title 28 of the United States Code.” *Id.* at 11. ASI’s counterclaims repeat the same allegations as to the citizenship of ASI and Kelly stated in the Simone

<sup>1</sup> Unless otherwise indicated, all references to docket numbers in this section are to the docket in the case *Lisa Simone Kelly v. Wally Roker et al.*, No. 11-cv-05822 JSW.  
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1 Estate's complaint. *Id.*

2 With the exception of the declaratory relief claim, all other claims asserted in the  
3 Simone Estate's complaint are based on state law. It is well established that the Declaratory  
4 Judgment Act, 28 U.S.C. § 2201, is not an independent basis for federal jurisdiction. *Skelly*  
5 *Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *N. Cnty. Commc'ns Corp. v.*  
6 *California Catalog & Tech.*, 594 F.3d 1149, 1154 (9th Cir. 2010). The Simone Estate does  
7 not contend otherwise, asserting instead that this Court has subject matter jurisdiction over  
8 the complaint based on diversity. However, the complaint does not contain sufficient  
9 allegations to establish the citizenship of the relevant parties for diversity purposes.

10 The allegation that Kelly is "an individual who resides in Florida," Dkt. No. 1 at 1, is  
11 inadequate for two reasons. First, allegations of residence are insufficient for purposes of  
12 establishing jurisdiction under 28 U.S.C. § 1332, which requires an analysis of citizenship.  
13 *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) ("The natural person's  
14 state citizenship is then determined by her state of domicile, not her state of residence. A  
15 person's domicile is her permanent home, where she resides with the intention to remain or  
16 to which she intends to return."); *Quinn v. McGraw-Hill Companies, Inc.*, 168 F.3d 331,  
17 334 n.1 (7th Cir. 1999). Second, and more fundamentally, it is the citizenship of the person  
18 or entity on whose behalf the action is maintained (here, the Simone Estate) that controls  
19 for diversity purposes. 28 U.S.C. § 1332(c)(2) ("[T]he legal representative of the estate of  
20 a decedent shall be deemed to be a citizen only of the same State as the decedent."); *see*  
21 *also Gustafson v. zumBrunner*, 546 F.3d 398, 400 (7th Cir. 2008) ("[T]he federal diversity  
22 statute treats 'the legal representative' of a decedent's estate (or the estate of an infant or an  
23 incompetent) as a citizen of the same state as the decedent."). The complaint here fails to  
24 allege the citizenship of the decedent, Nina Simone.

25 Furthermore, the Supreme Court has held that "[i]n order to be a citizen of a State  
26 within the meaning of the diversity statute, a natural person must both be a citizen of the  
27 United States *and* be domiciled within the State." *Newman-Green, Inc. v. Alfonzo-*  
28 *Larrain*, 490 U.S. 826, 828 (1989) (citations omitted). Thus, an American citizen who

1 moves abroad is not a citizen of any state for purposes of § 1332(a)(1) or an alien for the  
 2 purposes of § 1332(a)(2), and thus cannot sue or be sued in federal court on the basis of  
 3 diversity jurisdiction. *Id.*; see also *Brady v. Brown*, 51 F.3d 810, 815 (9th Cir. 1995);  
 4 *Brady Büchel-Ruegsegger v. Büchel*, 576 F.3d 451, 454-55 (7th Cir. 2009).

5 The Court also notes that the statement that “ASI is a corporation organized under  
 6 the laws of the State of New York,” Dkt. No. 1 at 2, does not adequately allege the  
 7 citizenship of ASI. See 28 U.S.C. § 1332(c)(1) (for purposes of diversity, “a corporation  
 8 shall be deemed to be a citizen of every State and foreign state by which it has been  
 9 incorporated *and* of the State or foreign state where it has its principal place of business”)  
 10 (emphasis added). Thus, the mere allegation that a corporate party is incorporated in a  
 11 particular state, without alleging where its principal place of business is located, is  
 12 insufficient to establish diversity. *Indiana Hi-Rail Corp. v. Decatur Junction Ry. Co.*, 37  
 13 F.3d 363, 365 n.3 (7th Cir. 1994); *Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035, 1039  
 14 (5th Cir. 1982). This deficiency, however, is not fatal, given the allegation by Andrew  
 15 Stroud and ASI in their Fourth Amended Counterclaims in the related action *Brown v.*  
 16 *Stroud* that ASI “is a corporation formed in New York with its principal place of business  
 17 in New York.” Case No. 08-cv-02348 JSW, Dkt. No. 297 at 2.

18 The Simone Estate’s motion for default judgment does not discuss the issue of  
 19 subject matter jurisdiction. Dkt. No. 133. By January 15, 2014, the Simone Estate must  
 20 submit a supplemental brief, accompanied by any appropriate declaration, providing  
 21 support for its position that the Court has subject matter jurisdiction over this action based  
 22 on diversity, and, if complete diversity is not present, explaining whether a different source  
 23 of subject matter jurisdiction exists. Any other party may file a brief limited to the issues  
 24 raised in this order within 7 days of filing of the Simone Estate’s brief.

## 25 **B. *Brown v. Stroud***

26 On May 7, 2008, Steven Ames Brown (“Brown”) filed a complaint against Andrew  
 27 Stroud and Stroud Productions and Enterprises, Inc. (“SPE”) in this Court. Dkt. No. 1.<sup>2</sup>

28 <sup>2</sup> Unless otherwise indicated, all references to docket numbers in this section are to the docket in the  
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1 Brown's First Amended Complaint asserts causes of action for declaratory relief and  
2 common law copyright infringement. Dkt. No. 35 at 4-5. The complaint states that "[t]he  
3 jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1332" and that the action "also  
4 arises under the Federal Declaratory Judgment Act 28 U.S.C. §§ 2201, 2202." *Id.* at 1.  
5 Brown alleges that he is a citizen of California and that defendants Andrew Stroud and SPE  
6 are citizens of New York. *Id.*

7 Andrew Stroud and ASI counterclaimed against Brown and the Estate of Nina  
8 Simone for declaratory judgment, copyright infringement, vicarious copyright  
9 infringement, contributory copyright infringement, violation of the Digital Millennium  
10 Copyright Act, and copyright infringement under California law. Dkt. No. 297 at 6-7. The  
11 counterclaims state that "jurisdiction is proper because the claims set out in this pleading  
12 form part of the same case or controversy as the original claim over which the Court has  
13 original jurisdiction and, therefore, falls within the supplemental jurisdiction of the Court  
14 under section 1367 of Title 28 of the United States Code." *Id.* at 2. The counterclaims  
15 further allege that Andrew Stroud is a resident of New York; SPE "was a corporation  
16 formed in New York with its principal place of business in New York"; ASI "is a  
17 corporation formed in New York with its principal place of business in New York"; Brown  
18 "is a resident of the State of California"; and "[t]he Estate of Nina Simone is administered  
19 in the State of California." *Id.*

20 Brown filed reply counterclaims against Andrew Stroud and SPE for declaratory  
21 judgment, unfair competition under California Business & Professions Code § 17200 *et*  
22 *seq.*, and relief under the All Writs Act, 28 U.S.C. § 1651. Dkt. No. 82 at 11-13. The  
23 claim for declaratory judgment is also asserted against Sony Music Entertainment ("Sony  
24 Music"). Dkt. No. 82 at 11. Brown's reply counterclaims state that "[t]he jurisdiction of  
25 this Court is invoked pursuant to 28 U.S.C. § 1332" and that the action "also arises under  
26 the Federal Declaratory Judgment Act 28 U.S.C. §§ 2201, 2202 and the All Writs Act 28  
27 U.S.C. § 1651." *Id.* at 7. Brown claims that jurisdiction is also proper "because the claims

1 set out below are part of the same case or controversy that is raised in Defendant's  
2 *Counterclaims*, and, therefore, jurisdiction is invoked pursuant to 28 U.S.C. § 1367." *Id.*  
3 Brown alleges that he is a citizen of California; Andrew Stroud is a citizen of New York;  
4 and Sony Music is a citizen of Delaware. *Id.*

5 The Simone Estate also counterclaimed. In its First Amended Counterclaims, Dkt.  
6 No. 263, the Simone Estate, "by its duly appointed administrator Lisa Simone Kelly,"  
7 asserts claims for declaratory judgment, conversion, replevin, and accounting. Dkt. No.  
8 263 at 12-23. The counterclaims state that "[t]his Court has jurisdiction over the subject  
9 matter of this action pursuant to 28 U.S.C. §§ 1331, 1332 and 1338 and principles of  
10 supplemental jurisdiction." *Id.* at 2. The counterclaims further assert that "[t]he claims  
11 herein arise under §§106, 201, and 501 of the Copyright Act (17 U.S.C. §§ 106, 201, 501),  
12 the Federal Declaratory Judgment Act 28 U.S.C., §§ 2201, 2202, and the common law,"  
13 and that "[j]urisdiction is also proper because the claims set out below are part of the same  
14 case or controversy that is raised in Stroud's SACC, pursuant to 28 U.S.C. §1367." *Id.*  
15 The Simone Estate alleges that it "is an estate which is administered in the State of  
16 California." *Id.*

17 Because the Declaratory Judgment Act, 28 U.S.C. § 2201, is not an independent  
18 basis for federal jurisdiction, Brown's First Amended Complaint contains only state law  
19 claims and thus can only support the exercise of subject matter jurisdiction based on  
20 diversity. The same is true with respect to Brown's reply counterclaims because the All  
21 Writs Act, 28 U.S.C. § 1651, is also not a separate claim for relief. *See* Dkt. No. 251 at 18-  
22 19; *Lights of America, Inc. v United States District Court*, 130 F. 3d 1369, 1370 (9th Cir.  
23 1997) (courts must possess an independent source of jurisdiction before entertaining a  
24 request for a writ).

25 To the extent the Simone Estate contends that this Court has subject matter  
26 jurisdiction over the Estate's First Amended Counterclaims based on diversity, the Simone  
27 Estate has not sufficiently alleged its citizenship for the same reasons discussed above in  
28 connection with the *Kelly v. Roker* case. Furthermore, the allegation by the Simone Estate



1 that it “is an estate which is administered in the State of California” is inconsistent with its  
2 jurisdictional allegations in the *Kelly v. Roker* case which were premised on the residence  
3 of the administrator of the Simone Estate. Again, the issue of subject matter jurisdiction is  
4 not addressed in either the Simone Estate’s or Brown’s motion for default judgment. Dkt.  
5 Nos. 522, 530.

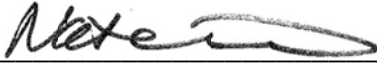
6 By January 15, 2014, the Simone Estate must submit a supplemental brief,  
7 accompanied by any appropriate declaration, providing support for its position that this  
8 Court has subject matter jurisdiction over the Simone Estate’s counterclaims based on  
9 diversity, and, if complete diversity is not present, explaining whether a different source of  
10 subject matter jurisdiction exists and on what specific basis. Any other party may file a  
11 brief limited to the issues raised in this order within 7 days of filing of the Simone Estate’s  
12 brief.

13 The Simone Estate must serve a copy of this order and the Simone Estate’s response  
14 on the parties in default, and must file a proof of service with the Court.

15 The Court will defer ruling on the default judgment motions until these jurisdictional  
16 issues are resolved.

17 IT IS SO ORDERED.

18 Date: December 18, 2013

  
Nathanael M. Cousins  
United States Magistrate Judge